112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 112–461
Part 1

REGULATORY FREEZE FOR JOBS ACT OF 2012

APRIL 27, 2012.—Ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4078]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4078) to provide that no agency may take any significant regulatory action until the unemployment rate is equal to or less than 6.0 percent, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Freeze for Jobs Act of 2012".

SEC. 2. DEFINITIONS.

In this Act—

(1) the terms "agency" and "rule" have the meanings given such terms under section 551 of title 5, United States Code;

(2) the term "regulatory action" means any substantive action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking, but not including any substantive action by an agency for repealing a rule;

(3) the term "significant regulatory action" means any regulatory action that is likely to result in a rule or guidance that may—

(A) have an annual cost to the economy of $100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, small entities, or State, local, or tribal governments or communities;

(B) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(C) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(D) raise novel legal or policy issues; and

(4) the term "small entities" has the meaning given such term under section 601(6) of title 5, United States Code.

SEC. 3. SIGNIFICANT REGULATORY ACTIONS.

(a) IN GENERAL.—No agency may take any significant regulatory action during the period beginning on the date of enactment of this Act and ending on the date that the Secretary of Labor submits the report under subsection (b).

(b) DETERMINATION.—The Secretary of Labor shall submit a report to the Director of the Office of Management and Budget whenever the Secretary determines that the Bureau of Labor Statistics average of monthly unemployment rates for any quarter beginning after the date of enactment of this Act is equal to or less than 6.0 percent.

SEC. 4. WAIVERS.

(a) IN GENERAL.—Notwithstanding any other provision of this Act, an agency may take a significant regulatory action only in accordance with either subsection (b) or subsection (c) during the period described in section 3(a).

(b) PRESIDENTIAL WAIVER.—An agency may take a significant regulatory action if the President determines by Executive order that the significant regulatory action is—

(1) necessary because of an imminent threat to health or safety or other emergency;

(2) necessary for the enforcement of criminal laws;

(3) necessary for the national security of the United States; or

(4) issued pursuant to any statute implementing an international trade agreement.

(c) CONGRESSIONAL WAIVERS.—

(1) SUBMISSION.—For any significant regulatory action not eligible for a Presidential waiver pursuant to subsection (b), the President may submit a written request to Congress for a waiver of the application of section 3 to the significant regulatory action.

(2) CONTENTS.—A submission by the President under this subsection shall—

(A) identify the significant regulatory action and the scope of the requested waiver;

(B) give all reasons why the significant regulatory action is necessary to protect the public health, safety, or welfare; and

(C) explain why the significant regulatory action is ineligible for a Presidential waiver pursuant to subsection (b).

(3) CONGRESSIONAL ACTION.—Congress shall give expeditious consideration and take appropriate legislative action with respect to any submission by the President under this subsection.

SEC. 5. JUDICIAL REVIEW.

(a) REVIEW.—Any party adversely affected or aggrieved by any regulatory action taken in violation of this Act is entitled to judicial review in accordance with chapter 7 of title 5, United States Code. Any determination by either the President or the Secretary of Labor under this Act shall be subject to judicial review under such chapter.

(b) JURISDICTION.—Each court having jurisdiction to review any significant regulatory action for compliance with any other provision of law shall have jurisdiction to review all claims under this Act.

(c) RELIEF.—In granting any relief in any civil action under this section, the court shall order the agency to take corrective action consistent with this Act and chapter 7 of title 5, United States Code, including remanding the significant regulatory action to the agency and enjoining the application or enforcement of that significant regulatory action, unless the court finds by a preponderance of the evidence that application or enforcement is required to protect against an imminent and serious threat to the national security of the United States.

(d) REASONABLE ATTORNEY'S FEES FOR SMALL BUSINESSES.—The court shall award reasonable attorney's fees and costs to a substantially prevailing small business in any civil action arising under this Act. A small business may qualify as substantially prevailing even without obtaining a final judgment in its favor if the agency that took the significant regulatory action changes its position after the civil action is filed.

(e) LIMITATION ON COMMENCING CIVIL ACTION.—A party may seek and obtain judicial review during the 1-year period beginning on the date of the challenged agency action or within 90 days after an enforcement action or notice thereof, except that where another provision of law requires that a civil action be commenced before the expiration of that 1-year period, such lesser period shall apply.

(f) DEFINITION.—In this section, the term "small business" means any business, including an unincorporated business or a sole proprietorship, that employs not more than 500 employees or that has a net worth of less than $7,000,000 on the date a civil action arising under this Act is filed.

Purpose and Summary

H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012" ("the Freeze Act" or "the Bill"), would put a moratorium on new significant regulations until the national unemployment rate stabilizes at or below 6.0%. The President could waive the moratorium by Executive Order and issue significant regulations for certain specific reasons, such as national security. With the consent of Congress, during the moratorium period the President may take any other significant regulatory action necessary to protect the public health, safety, or welfare. A significant regulatory action taken during the moratorium would be judicially reviewable, and a small business that successfully challenges such a regulation could recover attorney's fees.

Background and Need for the Legislation

A. OVERREGULATION IMPEDES JOB CREATION AND ECONOMIC GROWTH

Wasteful, excessive and unnecessary regulations impede job creation and economic growth. A study for the Small Business Administration found that Federal regulations cost the American economy $1.75 trillion dollars annually, which is equal to about 14% of the national income [1] and "nearly twice as much as all individual income taxes collected last year." [2] "Had every U.S. household paid

[1] *See* Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, SMALL BUSINESS ADMINISTRATION, 6 & 48 (Sept. 2010), *available at* http://archive.sba.gov/advo/research/rs371tot.pdf (last accessed Apr. 23, 2012).

[2] James L. Gattuso, Diane Katz & Stephen A. Keen, *Red Tape Rising: Obama's Torrent of New Regulation,* HERITAGE FOUNDATION (Oct. 26, 2010), *available at* http://www.heritage.org/re-

Continued

an equal share of the Federal regulatory burden, each would have owed $15,586 in 2008."[3] Another study found that "[e]ach million-dollar increase in the regulatory budget costs the economy 420 private sector jobs."[4] To extrapolate, "[a]s the size of the regulatory budget decreases, each lost regulator results in a gain of $6.2 million in annual GDP, and each lost regulatory position is offset by 98 private sector jobs. Switching to the mindset of a budget *increase,* we can conclude that the annual cost of a new regulator is about $6.2 million in GDP and 98 private sector jobs. In 2009, U.S. per-capita GDP was roughly $46,000, meaning each regulator destroys the economic output equivalent of about 134 persons and eliminates the jobs of nearly as many. These effects are sizeable."[5]

A recent Gallup Poll found that, among the 85% of U.S. small business owners who are not hiring, nearly half (46%) of these cited being "worried about new government regulations" as a reason they are not hiring.[6] A *New York Times* poll conducted in October 2011 found that "half of the public favors reducing or repealing regulations on businesses in the United States."[7] And 63% of respondents to a poll conducted for the National Federation of Independent Businesses said "rules issued over the last 5 years have done more to hurt than to help small businesses."[8]

President Clinton, for example, recognizes that over-regulation is inimical to job creation, and has urged the Federal Government to grant states waivers from environmental regulations for construction projects.[9] President Obama rhetorically seconded this viewpoint in a *Wall Street Journal* op-ed: "Sometimes, those rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs."[10] On August 31, 2011, President Obama asked several cabinet secretaries each to identify three "high-impact, job-creating infrastructure projects that can be expedited through outstanding review and permitting processes."[11] The President described this as "a common-sense step to speed job creation in the near term while increasing our competitiveness and

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search/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation (last accessed Apr. 23, 2012).

[3] Crain & Crain, note 1 *supra,* at iv.

[4] T. Randolph Beard et al., *Regulatory Expenditures, Economic Growth and Jobs: An Empirical Study,* PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC POLICY STUDIES, 5 (Apr. 2011), *available at* http://www.phoenix-center.org/PolicyBulletin/PCPB28Final.pdf (last accessed Apr. 23, 2012).

[5] *Id.* at 16.

[6] *See* Dennis Jacobe, "Health Costs, Gov't Regulations Curb Small Business Hiring," GALLUP (Feb. 15, 2012), *available at* http://www.gallup.com/poll/152654/Health-Costs-Gov-Regulations-Curb-Small-Business-Hiring.aspx (last accessed Apr. 23, 2012).

[7] Jeff Zeleny & Megan Thee-Brenan, "New Poll Finds a Deep Distrust of Government," NEW YORK TIMES, Oct. 25, 2011, *available at* http://www.nytimes.com/2011/10/26/us/politics/poll-finds-anxiety-on-the-economy-fuels-volatility-in-the-2012-race.html (last accessed Apr. 23, 2012).

[8] *See* "Survey: Majority of Americans Support Reforms to Federal Regulatory Process," NFIB, Feb. 21, 2012, *available at* http://www.sensibleregulations.org/wp-content/uploads/2012/02/Final-Final-Final-SBSR-Poll-Press-release-0221.pdf (last accessed Apr. 23, 2012).

[9] Bill Clinton, *It's Still the Economy, Stupid,* NEWSWEEK, June 19, 2011, *available at* http://www.thedailybeast.com/newsweek/2011/06/19/it-s-still-the-economy-stupid.html (last accessed Apr. 23, 2012).

[10] Barack Obama, "Toward a 21st Century Regulatory System," WALL STREET JOURNAL, Jan. 18, 2011, *available at* http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html (last accessed Apr. 23, 2012).

[11] Press Release, "White House Announces Steps to Expedite High Impact Infrastructure Projects to Create Jobs," Aug. 31, 2011, *available at* http://www.whitehouse.gov/the-press-office/2011/08/31/white-house-announces-steps-expedite-high-impact-infrastructure-projects (last accessed Apr. 23, 2012).

strengthening the economy in the long term."[12] On October 11, 2011, in the interest of job creation and economic recovery the President announced 14 projects for expedited environmental review and permitting.[13] The President has directed agencies to "consider how best to promote retrospective analysis of [economically significant] rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them. . . ."[14] President Obama also urged independent agencies to "consider how best to promote" the same regulatory review.[15] Speaking to a joint session of Congress on September 8, 2011, President Obama said, "We should have no more regulation than the health, safety and security of the American people require. Every rule should meet that common-sense test."

B. REGULATORY COSTS ARE INCREASING UNDER THE OBAMA ADMINISTRATION

The national unemployment rate has not been below 6.0% since July 2008—but under the Obama Administration, the cost of regulations is increasing and the fear that yet another regulatory wave is swelling continues to stifle economic recovery. The need for regulatory restraint is apparent from the fact that agencies presently are issuing more of the regulations that are most costly to job creators.

President Obama's Fall 2011 Unified Agenda of Regulatory and Deregulatory Activity lists 133 economically significant regulations in the proposed or final stage of the rulemaking process (5 more are in the pre-rule stage).[16] By comparison, the Fall 2003 Unified Agenda—issued in the third year of the first term of the Bush Administration—listed 62 such economically significant regulations.[17] "In the past decade, the number of economically significant rules in the agenda has increased by more than 137 percent, rising from 56 in spring 2001 to 133 in fall 2011."[18] These 133 rules each represent at least $100 million in annual economic effects. This is consistent with the Obama Administration's tactic of bypassing Congress and taking unilateral Executive action to advance its agenda.[19]

The regulatory burden on the American economy undeniably increased between 2001 and 2009. The Heritage Foundation estimates that President Bush added approximately $60 billion in an-

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[12] *Id.*

[13] Press Release, "Obama Administration Announces Selection of 14 Infrastructure Projects to be Expedited Through Permitting and Environmental Review Process," Oct. 11, 2011, *available at* http://www.whitehouse.gov/the-press-office/2011/10/11/obama-administration-announces-selection-14-infrastructure-projects-be-e (last accessed Apr. 23, 2012).

[14] *See* Exec. Order 13563, § 6(a) (Jan. 18, 2011).

[15] *See* Exec. Order 13579, § 2(a) (July 11, 2011).

[16] *See* James L. Gattuso & Diane Katz, "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark," HERITAGE FOUNDATION (Mar. 13, 2012), at 5, Chart 2, *available at* http://www.heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-the-three-year-mark (last accessed Apr. 23, 2012).

[17] *See id.*

[18] *Id.* at 6.

[19] *See, e.g.,* Peter Baker, "Obama Making Plans to Use Executive Power," NEW YORK TIMES, Feb. 12, 2010 (Dan Pfeiffer: "In 2010, executive actions will also play a key role in advancing the agenda."); David Nakamura & Felicia Sonmez, "Obama appoints Richard Cordray to head consumer watchdog bureau," WASHINGTON POST, Jan. 4, 2012 (President Obama: "When Congress refuses to act and as a result hurts our economy and puts people at risk, then I have an obligation as president to do what I can without them.").

nual regulatory costs over 8 years.[20] But in just 3 years, President Obama adopted 106 major rules that impose on the private sector nearly $11 billion in one-time implementation costs and $46 billion in additional annual regulatory costs. By comparison, in his first 3 years President Bush adopted 28 major rules that impose $8.1 billion in additional annual private sector costs. In 2011, the largest portion of these 106 major rules was made to implement Dodd-Frank. The most expensive were from the EPA, which issued five major rules costing more than $4 billion annually.[21]

The threat of even more significant regulations, to implement the Patient Protection and Affordable Care Act[22] and the Dodd-Frank Wall Street Reform and Consumer Protection Act[23], is another impediment to economic recovery. The President's signature health care law, for example, "provides for the creation of nearly 160 boards, bureaus, bureaucracies, and commissions. . . . Overall, the Federal Government is expected to issue roughly 10,000 pages of new regulations to govern the implementation of the new law."[24] And "the Dodd-Frank Act is the most farreaching financial regulatory undertaking since the 1930's, authorizing or requiring agencies to enact 447 new rules and complete 63 reports and 59 studies."[25] Agencies already have missed more than two-thirds (69.8%) of Dodd-Frank's rulemaking deadlines, and more than one-third of the rules required by the Act have not even been proposed yet.[26] Consequently, "uncertainty reigns and nearly $2 trillion in cash sits in corporate coffers."[27]

C. THE NEED FOR A REGULATORY MORATORIUM

A September 16, 2010, op-ed by a group of Hoover Institution economists recommended a general regulatory freeze as part of a strategy for economic recovery:

> *[E]nact a moratorium on all new regulations for the next 3 years, with an exception for national security and public safety.* Going forward, regulations should be transparent and simple, pass rigorous cost-benefit tests, and rely to a maximum extent on market-based incentives instead of command and control. Direct and indirect cost estimates of regulations and subsidies should be published before new regulations are put into law.[28]

Dr. Allan Meltzer, a co-author of the op-ed, separately called for "a 5-year moratorium on new regulation except for national secu-

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[20] *See* James L. Gattuso, *Obama's Red Tape: Tsunami or Ripple?,* HERITAGE FOUNDATION (Nov. 8, 2011), *available at* http://www.heritage.org/Research/Reports/2011/11/Obamas-Regulations-Red-Tape-Tsunami-or-Ripple (last accessed Apr. 23, 2012).

[21] *See* Gattuso & Katz, note 16 *supra,* at 3.

[22] 111 P.L. 148 (Mar. 23, 2010).

[23] 111 P.L. 203 (July 21, 2010).

[24] *ObamaCare: A Budget-Busting, Job-Killing Health Care Law,* Jan. 6, 2011, at 7–8, *available at* http://www.speaker.gov/UploadedFiles/ObamaCareReport.pdf (last accessed Apr. 23, 2012).

[25] Michael J. Ryan, Jr., *U.S. Capital Markets Competitiveness: The Unfinished Agenda,* Summer 2011, at 3, *available at* https://www.uschamber.com/sites/default/files/reports/1107_UnfinishedAgenda_WEB.pdf (last accessed Apr. 23, 2012).

[26] Davis Polk LLP, "Dodd-Frank Progress Report," Apr. 2012, *available at* http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/(last accessed Apr. 24, 2012).

[27] George P. Shultz, et al., "Principles for Economic Revival," WALL STREET JOURNAL, Sept. 16, 2010, *available at* http://www.hoover.org/news/daily-report/48571 (last accessed Apr. 23, 2012).

[28] *Id.*

rity."[29] Wayne Crews, Vice President for Policy and Director of Technology Studies at the Competitive Enterprise Institute, has endorsed "a year-long moratorium on 'significant' rules, typically defined as those expected to cost $100 million annually."[30] Analyzing the above-cited poll results, Gallup's Chief Economist Dennis Jacobe, Ph.D., observed that "lawmakers could place a moratorium on new regulations for some period of time. In turn, this might provide the extra push needed to get small-business owners to decide to hire the employees they actually need and get the economy growing at a pace the average American can recognize as an economic recovery."[31]

D. LEGISLATIVE HISTORY OF H.R. 4078

On February 27, 2012, the Committee on the Judiciary's Subcommittee on Courts, Commercial and Administrative Law held a hearing on the Freeze Act.[32] At this hearing, the Subcommittee received testimony from three witnesses: Professors Allan H. Meltzer and John B. Taylor; and, Mr. Robert Weissman, President of Public Citizen, Inc. Professors Meltzer and Taylor testified in support of the Bill. In his testimony, Professor Meltzer explained that economic recovery and growth are stunted because "investors and producers are uncertain about regulation and taxation."[33] According to Professor Meltzer, the Bill would prioritize employment and recovery by giving job creators greater confidence about future regulatory events.[34] Professor Taylor testified that the economy has recovered at a much slower pace than it did from the recession of the early 1980's "due to poor economic policy, including, among other things, a large increase in both the number of significant regulations and the regulatory uncertainty related to new legislation," such as Dodd-Frank.[35] In Professor Taylor's view, this approach is based upon the misperception that the financial crisis and recession were caused by inadequate regulatory authority.[36] Mr. Weissman testified against the Bill. Although he described the current unemployment rate as "scandalously" and "shamefully" high,[37] Mr. Weissman testified that "excessive regulation is neither the cause of the jobs crisis nor a meaningful impediment to job creation"; a *lack* of regulation contributed to the financial crisis and economic recession; "regulatory protections make our country stronger, safer and more just"; and, the Bill could have the unintended consequence of blocking desirable regulations.[38]

In addition to the Freeze Act, several regulatory moratorium bills have been introduced in the 112th Congress. Senator Johnson's (R-WI) bill, S. 1438, would prohibit any Federal agency from enacting a new significant regulation, as defined by President Clinton in Ex-

[29] "Get a Job!," REASON, Nov. 11, 2011, *available at* http://reason.com/archives/2011/10/18/get-a-job/singlepage (last accessed Apr. 23, 2012).
[30] "Time Out for Federal Regulation," FORBES BLOG, Oct. 13, 2011, *available at* http://www.forbes.com/sites/waynecrews/2011/10/03/time-out-for-federal-regulation/(last accessed Apr. 23, 2012).
[31] Jacobe, note 6 *supra.*
[32] *Regulatory Freeze for Jobs Act of 2012: Hearing before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* 112th Cong. (Feb. 27, 2012).
[33] *Id.* at 15.
[34] *See id.* at 16.
[35] *Id.* at 25.
[36] *Ibid.*
[37] *Id.* at 30, 31.
[38] *Id.* at 30, 34–37, 37 and 41–43.

ecutive Order 12866, until the national unemployment rate is at or below 7.7% (it was 7.8% when President Obama took office). S. 1438 allows the President to waive the freeze and issue a new significant regulation "on the basis of national security or a national emergency," or with the consent of Congress. On September 12, 2011, Mr. Ribble introduced the House companion, H.R. 2898, to Senator Johnson's bill. Other Members sponsoring regulatory freeze bills are: Mr. Young (H.R. 213 and H.R. 3181); Mr. Ribble (H.R. 1281 and H.R. 2898); Mr. Carter (H.R. 1235); Mr. Rogers (H.R. 3518); Mr. Hanna (H.R. 3257); and, Mr. Griffin (H.R. 3194). H.R. 3400, the "Jobs Through Growth Act," contains a regulatory moratorium section under Title II. The Freeze Act utilizes concepts and language from these bills.

In the 104th Congress, the House passed the Regulatory Transition Act of 1995 ("RTA"). In brief, the RTA would have put a moratorium on all rules—not just certain significant rules, as the Freeze Act does—until the earlier of either December 31, 1995, or a law was enacted requiring agencies to perform cost-benefit and risk-assessment analysis on all new regulations. The RTA excepted rules "necessary because of an imminent threat to health or safety or other emergency" or to enforce civil rights laws, and also did not cover rules related to the military, foreign affairs, international trade, agency administration, the IRS, the Federal Reserve or FDIC, or to any agency action repealing, narrowing or streamlining a rule. Unlike the Freeze Act, the RTA did not allow for judicial review. After passing the House with bipartisan support, the RTA did not advance out of the Committee on Governmental Affairs in the Senate.

Hearings

On Monday, February 27, 2012, the Committee on the Judiciary's Subcommittee on Courts, Commercial and Administrative Law held a hearing on H.R. 4078. Testimony was received from Professor John B. Taylor, George P. Shultz Senior Fellow in Economics at the Hoover Institution and the Mary and Robert Raymond Professor of Economics at Stanford University; Professor Allan H. Meltzer, Distinguished Visiting Fellow at the Hoover Institution and the Allan H. Meltzer University Professor of Political Economy at the Tepper School of Business, Carnegie Mellon University; and, Mr. Robert Weissman, President of Public Citizen, Inc. Without objection at the hearing, Mr. Coble entered into the record a letter from the U.S. Chamber of Commerce endorsing the Bill; Mr. Cohen submitted for the record a letter from the Coalition for Sensible Safeguards in opposition to the Bill.

Committee Consideration

On March 20, 2012, the Committee on the Judiciary met in open session and ordered the bill H.R. 4078 favorably reported, with an amendment, by a vote of 15 to 13, a quorum being present.

Committee Votes

By unanimous consent, an amendment in the nature of a substitute offered by Mr. Griffin was considered the base text for purposes of markup. In compliance with clause 3(b) of rule XIII of the

Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 4078.

1. Amendment #1, offered by Mr. Conyers, to amend the definition of "significant regulatory action" to exclude any rule or guidance intended to protect the privacy of Americans. Not agreed to by a vote of 12 to 17.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	12	17	

2. Amendment #2, offered by Mr. Nadler, to amend the definition of "significant regulatory action" to exclude nuclear reactor safety standards. Not agreed to by a vote of 13 to 17.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	13	17	

3. Amendment #5, offered by Ms. Jackson Lee, to amend the definition of "significant regulatory action" to exclude a rule or guidance issued by the Secretary of Homeland Security. Not agreed to by a vote of 12 to 15.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy			
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	12	15	

4. Amendment #3, offered by Ms. Jackson Lee, to amend the definition of "significant regulatory action" to exclude a rule or guidance made under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Not agreed to by a vote of 11 to 14.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy		X	
Mr. Ross			
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	11	14	

5. Amendment in the Nature of a Substitute, offered by Mr. Griffin. Agreed to by a vote of 13 to 12.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.			

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin	X		
Mr. Marino			
Mr. Gowdy			
Mr. Ross			
Ms. Adams	X		
Mr. Quayle	X		
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen			
Mr. Johnson, Jr.			
Mr. Pierluisi		X	
Mr. Quigley			
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez		X	
Mr. Polis		X	
Total	13	12	

6. Motion to report H.R. 4078, as amended, favorably to the House. Agreed to by a vote of 15 to 13.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble	X		
Mr. Gallegly	X		

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Goodlatte			
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin	X		
Mr. Marino			
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Cohen			
Mr. Johnson, Jr.			
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez		X	
Mr. Polis		X	
Total	15	13	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4078, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 20, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Sarah Anders, who can be reached at 226–9010.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 4078—Regulatory Freeze for Jobs Act of 2012.

As ordered reported by the House Committee on the Judiciary on March 20, 2012.

SUMMARY

H.R. 4078 would prohibit Federal agencies from taking most significant regulatory actions until the unemployment rate falls to 6 percent or less. The legislation would affect many regulatory actions that vary greatly in nature and scope. CBO and the staff of the Joint Committee on Taxation (JCT) cannot determine the budgetary effects of delaying significant regulatory actions, but we expect that enacting H.R. 4078 would have effects on both direct spending and revenues. Pay-as-you-go procedures apply because enacting the legislation would affect direct spending and revenues.

CBO expects that implementing H.R. 4078 also could have a significant impact on spending subject to appropriation, although we cannot determine the magnitude of that effect.

CBO expects that H.R. 4078 would impose no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Background

H.R. 4078 would prohibit agencies from taking significant regulatory actions until the average of monthly unemployment rates for any calendar quarter is 6 percent or less. H.R. 4078 would allow exemptions for certain significant regulatory actions if the President determines via an executive order that the action is necessary for one of four reasons: (1) to respond to an imminent threat to health or safety, (2) to enforce criminal laws, (3) to protect national security, or (4) to implement an international trade agreement.

Further, under the bill, the Congress would have to expeditiously consider and act on any additional waivers the President requests for significant regulatory actions that do not meet one of the four criteria listed above. If an agency were to pursue a significant regulatory action in violation of H.R. 4078, any party adversely affected by that action would be entitled to judicial review.

H.R. 4078 defines a *significant regulatory action* as any Federal regulatory action that is likely to result in a rule or guidance that may:

- Have an annual cost to the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, small entities, or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues.

The term significant regulatory action was originally defined in 1993 by Executive Order 12866, and is used to determine whether a regulatory action is subject to regulatory review by the Office of Information and Regulatory Affairs (OIRA).[1] H.R. 4078 largely uses the same definition established by that executive order, but expands the scope to include guidance as well as rulemaking, and also to include independent regulatory agencies.[2]

Looking to recent regulatory actions as a way to estimate the number of future regulatory actions that would be affected by H.R. 4078 is uncertain because agencies can change course following the enactment of the bill. However, historical data shows that OIRA reviewed 740 significant regulatory actions in 2011 and 657, on aver-

[1] See http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf, pg. 4.

[2] In addition, the definition of significant regulatory action in Executive Order 12866 applies to regulatory actions that have an annual effect on the economy of $100 million or more, whereas H.R. 4078 applies to regulatory actions that have an annual cost to the economy of $100 million or more. However, a regulatory action that saves $100 million or more would likely still be classified as a significant regulatory action under H.R. 4078 because such actions are likely to fall under the other clauses of the bill's definition as described above.

age, over the past five calendar years.[3] Examples of those regulatory actions in 2011 include: required warnings for cigarette packages and advertisements, Medicare payment rates for inpatient psychiatric facilities, and national emission standards for hazardous air pollutants from industrial, commercial and institutional boilers.

H.R. 4078 would delay significant regulatory actions until the average of monthly unemployment rates for any quarter is 6.0 percent or lower. Under CBO's most recent economic forecast, the unemployment rate is expected to remain elevated for at least the next few years; in those projections the unemployment rate would remain above 6.0 percent until late 2016.[4] However, many developments could cause economic outcomes to differ substantially, in one direction or the other. For example, the economy could grow more rapidly—or more slowly—with a consequent acceleration (or reduction) in the pace of employment. Furthermore, changes in fiscal policy that diverge from the path assumed in CBO's baseline could have a significant impact on economic growth and, by extension, the unemployment rate.

Impact on Direct Spending

The budgetary consequences of preventing significant regulatory action also would vary tremendously because the budgetary impact of different rules varies considerably. For example, of the three rules mentioned above, only one—Medicare payment rates for inpatient psychiatric facilities—has a significant Federal budgetary impact.

Delaying or preventing some significant regulatory actions would result in costs to the Federal Government, while delaying or preventing others would result in savings. On net, CBO estimates that enacting H.R. 4078 would have a significant effect on direct spending, but we cannot determine the magnitude or sign of those changes. Short-term effects would be driven by: (1) preventing annual updates to payment schedules for certain Medicare services and other routine revisions to aspects of selected government programs, (2) preventing payment rate reductions scheduled to take place under the Medicare physician fee schedule, and (3) altering the implementation of new Federal programs with substantial budget effects.

Routine Updates to Government Programs. Many routine significant regulatory actions are health-related and in particular pertain to Medicare. Some examples include rules that establish annual updates to payment rates for services provided by hospitals, physicians, and other Medicare providers. Enacting H.R. 4078 would freeze payment structures for those providers at current levels. Similarly, payment rates (such as the annual benefit amount for each individual) under some other Federal programs may also be temporarily frozen under the bill. CBO cannot estimate the net impact of all such changes.

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[3] See http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init. The number of significant regulatory actions under H.R. 4078 in a given year may exceed the number reviewed by OIRA because, unlike Executive Order 12866, H.R. 4078 applies to guidance and independent regulatory agencies.

[4] See Congressional Budget Office, The Budget and Economic Outlook: Fiscal Years 2012 to 2022 (January 2012), Appendix E.

Many programs, like Social Security, make annual adjustments in the benefits that are paid, often referred to as a cost-of-living adjustment. The new amounts are published in the Federal register, but do not rise to the level of significant regulatory action. Thus, under the bill, CBO expects that these types of programs would continue to operate as they normally do, though agencies would not be able to make significant changes to the program while the moratorium was in effect.

Delay Implementation of Legislation. Enacting H.R. 4078 may also affect the implementation of new laws. For example, additional rules and guidance related to the implementation of the Affordable Care Act are expected in coming months. Many of these anticipated regulatory actions are consequential for health insurance exchanges, which are to become operational in 2014 under current law. Delaying those regulatory actions could delay implementation of health insurance exchanges, which would in turn result in significant savings to the Federal budget, relative to spending expected under current law.

This bill also could delay the implementation of new initiatives aimed at making more electromagnetic spectrum available for wireless services. As required by title VI of the Middle Class Tax Relief and Job Creation Act of 2012, the Federal Communications Commission (FCC) is developing proposed rules for what are known as "incentive auctions," for private firms to voluntarily relinquish some or all of their existing spectrum rights in exchange for a payment from the FCC. That spectrum would then be available for new licensed uses. Provisions in that act regarding the use of spectrum by Federal agencies and the development of a wireless network for public safety users are being implemented by the Department of Commerce. A delay in the implementation of those programs would increase net direct spending (by reducing expected auction receipts) by several billion dollars over the 2013N2022 period, relative to current law.

Impact on Revenues

Enacting H.R. 4078 also would affect revenues, and JCT expects that delaying significant regulatory actions of the Internal Revenue Service could reduce collections of revenues in some cases and increase collections in other cases. JCT cannot determine the sign or magnitude of the possible effects on revenues.

Enacting H.R. 4078 would also directly affect revenues through the operations of the Federal Reserve, which remits its net earnings to the Treasury; those remittances are classified as revenues in the Federal budget. H.R. 4078 would prevent the Federal Reserve from writing rules and regulations to implement enacted legislation or to change any such rules and regulations currently in place if the rules or regulations would be considered significant regulatory action. The bill also would limit the ability of the Federal Reserve to conduct monetary policy because some parameters, such as the discount rate and the interest rate paid on reserves, are specified in regulations. However, H.R. 4078 probably would have no effect on the Federal Reserve's purchases and sales of securities. Preventing some rules and regulations from going into effect could reduce Federal Reserve remittances in some cases and

increase remittances in other cases. CBO cannot determine the sign or magnitude of the possible effects on revenues.

Impact on Spending Subject to Appropriation

H.R. 4078 also would affect programs for which spending is subject to the annual appropriations process. However, CBO cannot determine the magnitude of that effect. For example, if the Environmental Protection Agency were prohibited from issuing final rules while the unemployment rate exceeds 6 percent, there could be reductions in spending for the agency, subject to appropriation action. A second example involves annual calculations made by the Department of Housing and Urban Development (HUD) of the fair-market rents that it uses to determine rental subsidies for low-income individuals. We expect that the bill would prohibit those calculations from being made and implemented, which would prevent the rental subsidy from adjusting for changes in market conditions. Any increase in rents would be paid for by the tenant and not by HUD and if tenants were unable to pay the increased rent, some landlords would likely leave the program.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. Pay-as-you-go procedures apply to H.R. 4078 because enacting the legislation would affect direct spending and revenues. CBO and JCT cannot determine the sign or magnitude of those effects.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

CBO expects that H.R. 4078 would impose no intergovernmental or private-sector mandates as defined in UMRA. By delaying significant regulatory actions, the bill could affect public or private entities in a number of ways, including slowing reimbursements and eliminating or changing regulatory requirements. While the costs and savings tied to those individual effects could be significant, CBO has no basis for estimating either the overall direction or magnitude of those effects on public or private entities because of uncertainty about the nature and number of regulations affected.

ESTIMATE PREPARED BY:

Federal Costs: Sarah Anders
Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle
Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Holly Harvey
Deputy Assistant Director for Budget Analysis

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4078, will help create jobs by putting a moratorium on unnecessary significant reg-

ulatory actions until the unemployment rate stabilizes at or below 6.0 percent.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4078 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1: Short Title. This section designates the Bill as the "Regulatory Freeze for Jobs Act of 2012."

Section 2: Definitions. This section defines the terms "agency" and "rule" per the Administrative Procedure Act, 5 U.S.C. § 551; "regulatory action" per Executive Order 12866, but not including a regulatory action that repeals an existing rule; "significant regulatory action" per Executive Order 12866, except that the bill only covers a regulatory action with "*costs to* the economy of $100 million or more," while Executive Order 12866 speaks to "*effects on* the economy of $100 million or more"; and, "small entity" per the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601(6).

Section 3: Significant Regulatory Actions. Together, Sections 3(a)-(b) prohibit agencies from taking any significant regulatory action until the Secretary of Labor certifies to the Director of the Office of Management and Budget that the average national monthly unemployment rate for the last quarter is at or below 6.0%.

Section 4: Waivers. Section 4(a) states that an agency may take a significant regulatory action during the moratorium period only pursuant to either Section 4(b) or Section 4(c). Using the same waiver criteria as H.R. 10, the REINS Act, Section 4(b) allows the President to waive Section 3 by an Executive Order certifying that the significant regulatory action is necessary because of an imminent threat to health or safety or other emergency; for the enforcement of criminal laws; for national security; or, was issued to implement an international trade agreement. Section 4(c) allows the President to submit to Congress a written request for a waiver to take a significant regulatory action during the moratorium period when the significant regulatory action is "necessary to protect the public health, safety and welfare" but is not eligible for a Presidential waiver under Section 4(b).

Section 5: Judicial Review. This section authorizes judicial review for any person aggrieved by a regulatory action taken in violation of the Act. Section 5(c) allows a court to forgo enjoining a significant regulatory action taken in violation of the Act if the court finds by a preponderance of the evidence that the regulation is required to protect against an imminent and serious threat to the national security of the United States. Section 5(d) allows small businesses to collect reasonable attorney's fees in some cases; Section 5(f) draws upon the definition of "small business" given by the Equal Access to Justice Act, 24 U.S.C. § 2412(d)(2)(B)(ii). Section 5(e) requires suit to be brought within 1 year, or within 90 days

for an agency enforcement action (unless another law imposes a statute of limitations shorter than 1 year).

Dissenting Views

INTRODUCTION

H.R. 4078, the "Regulatory Freeze for Jobs Act of 2012," is the fifth time during this Congress that the Judiciary Committee has marked up legislation aimed at hobbling the ability of Federal agencies to promulgate regulations.[1] This latest measure is based on the false assumption that regulations inhibit job creation. With only limited exceptions, H.R. 4078, as amended, would prohibit an agency from taking any "significant regulatory action"[2] until the average of monthly unemployment rates for any quarter is six percent or less. The Congressional Budget Office (CBO) observes that the unemployment rate may remain above this threshold "until late 2016."[3]

H.R. 4078 is bad policy because it: (1) is based on the false premise that regulations and job creation are linked; (2) is a blunt instrument that needlessly jeopardizes public health and safety; (3) ignores the benefits of regulation; (4) fails to account for the extensive procedural requirements of the rulemaking process; (5) is unworkable and will create more, not less, business uncertainty; (6) may undermine job creation by increasing the risk of regulatory failure; and (7) may present separation of powers concerns. As the Administrator of the Office of Information and Regulatory Affairs has observed, a rulemaking moratorium would be "like a nuclear bomb in the sense that it would prevent regulations that . . . cost very little and have very significant economic or public health benefits."[4] Accordingly, H.R. 4078 is opposed by the Coalition for Sensible Safeguards, a coalition of more than 70 organizations, including the AFL-CIO, BlueGreen Alliance, Center for Food Safety, Consumer Federation of America, Consumers Union, Friends of the Earth, League of Conservation Voters, National Women's Law Center, Natural Resources Defense Council, OMB Watch, Public Citizen, Service Employees International Union, Union of Concerned Scientists, and the UAW.[5] Noting the legislation's "overly broad scope and impact," the Coalition warns that H.R. 4078 would "halt new standards to protect workplace safety, the environment, food

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[1] *See* H.R. 10, the Regulations From the Executive in Need of Scrutiny Act of 2011, 112th Cong. (2011); H.R. 527, Regulatory Flexibility Improvements Act of 2011, 112th Cong. (2011); H.R. 3010, the Regulatory Accountability Act of 2011, 112th Cong. (2011); H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act, 112th Cong. (2012).

[2] The bill defines "significant regulatory action" as any regulatory action that is likely to result in a rule or guidance that may have an annual cost to the economy of $100 million or more or have a material adverse effect on the economy, as explained in greater detail *infra*.

[3] Congressional Budget Office Cost Estimate, H.R. 4078, the Regulatory Freeze for Jobs Act of 2012, at 3 (Apr. 20, 2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr4078.pdf [hereinafter CBO Cost Estimate]. The CBO notes, however, that "many developments could cause economic outcomes to differ substantially, in one direction or the other." *Id.*

[4] *How a Broken Process Leads To Flawed Regulations: Hearing Before the H. Comm. on Oversight and Government Reform,* 112th Cong. 181 (2011) (testimony of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

[5] Letter from Katherine McFate, President and CEO, OMB Watch, & Robert Weissman, President, Public Citizen, Co-Chairs of the Coalition for Sensible Safeguards, to Rep. Lamar Smith (R-TX), Chair, and Rep. John Conyers, Jr. (D-MI), Ranking Member, House Committee on the Judiciary (Mar. 16, 2012), *available at* http://www.sensiblesafeguards.org/assets/documents/css-letter-re-4078.pdf.

safety and consumer product safety." [6] For these reasons, and those described below, we respectfully dissent and urge our colleagues to reject this seriously flawed bill.

DESCRIPTION AND BACKGROUND

H.R. 4078, as amended, would impose a moratorium on any regulatory action that is likely to result in a rule or guidance that may have an annual cost to the economy of $100 million or more, or meets other specified criteria until the Bureau of Labor Statistics average of monthly unemployment rates for any quarter is six percent or less.

Introduced by Rep. Tim Griffin (R-AR) on February 17, 2012, the bill was referred to the Committee on Oversight and Government Reform, and the Judiciary Committee. Currently, H.R. 4078 has 17 cosponsors, all of whom are Republicans. On February 27, 2012, the Courts, Commercial and Administrative Law Subcommittee (Subcommittee) held a hearing on H.R. 4078.[7] The Minority witness was Robert Weissman, President of Public Citizen. Mr. Weissman identified numerous flaws with the bill, including its highly limited exceptions. Noting that H.R. 4078 was "misguided" and "dangerous," he warned that the bill would effectively "block for five years with almost no relevant exceptions the issuance of new health, safety, environmental, and financial protections." [8]

A section-by-section explanation of the reported version of the bill's principal provisions follows. Section 2 defines various terms used in the measure. First, it imports the definitions of "agency" and "rule" from the Administrative Procedure Act (APA).[9] The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with certain exceptions.[10] Therefore, "agency" as used in this measure includes independent regulatory agencies, and not just the Executive Branch agencies subject to Presidential control. The APA defines "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." [11]

Second, section 2 defines "regulatory action" to mean "any substantive action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation. . . ." Such action includes various notices, such as notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking. This definition is derived from President Clinton's Executive Order 12,866.[12] Unlike this Executive Order, however, section 2 excepts any substantive action by an agency for repealing a rule.

Third, section 2 defines "significant regulatory action" broadly as any regulatory action that is likely to result in a rule or guidance that may have: (1) at least a $100 million cost to the economy; or (2) adversely affect in a material way the economy, a sector of the

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[6] *Id.* at 2.

[7] *Regulatory Freeze for Jobs Act of 2012: Hearing on H.R. 4078 Before the Subcomm. on Courts, Commercial Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2012).

[8] *Id.* at 28, 48 (testimony of Robert Weissman, President, Public Citizen).

[9] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2012).

[10] 5 U.S.C. § 551(1) (2012).

[11] 5 U.S.C. § 551(4) (2012).

[12] Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

economy, productivity, competition, jobs, the environment, public health or safety, small entities, or state, local, or tribal governments or communities. "Significant regulatory action" also can include a rule or guidance that may: (1) create a serious inconsistency or interfere with another agency's action; (2) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of their recipients; or (3) raise novel legal or policy issues.

Although this definition is largely derived from the definition of "significant regulatory action" contained in President Clinton's Executive Order 12866, it departs from that definition in several significant ways. First, the bill's definition is broader than its counterpart in the Executive Order in that it includes agency guidance and is not limited to rules. In addition, the Amendment's definition includes "small entities," whereas the Executive Order does not. Further, the bill's definition with respect to "novel legal or policy issues" does not include the Executive Order's provision limiting these issues "arising out of legal mandates, the President's priorities, or the principles" set forth in the Executive Order. Finally, the bill's definition is narrower than the one in the Executive Order in that the $100 million threshold is limited to economic "cost" as opposed to economic "effect."

Fourth, section 2 imports the definition of "small entity" contained in section 601(6) of the Regulatory Flexibility Act (RFA). The RFA defines "small entity" as a small business [13], small organization [14], or small governmental jurisdiction [15].

Section 3(a) of the bill provides that no agency may take any significant regulatory action until the Secretary of Labor submits a report required by subsection (b). Section 3(b) requires the Secretary of Labor to submit a report to the Office of Management and Budget whenever the Secretary determines that the Bureau of Labor Statistics average monthly unemployment rate for any quarter is equal to or less than six percent after the Amendment's enactment date.

Section 4(a) provides that an agency may take a significant regulatory action only in accordance with subsection (b) or (c) of this measure. Subsection (b) provides that an agency may take a significant regulatory action if the President determines by executive order that such action is: (1) necessary because of an imminent threat to health or safety or other emergency; (2) necessary for the

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[13] The RFA defines "small business" as having the same meaning as "small business concern" under section 3 of the Small Business Act unless an agency, after consultation with the Small Business Administration's Office of Advocacy, establishes a different definition. 5 U.S.C. § 601(3) (2012). The Small Business Act defines "small business concern" as "one which is independently owned and operated and which is not dominant in its field of operation: Provided, That notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of $750,000." Pub. L. No. 85–536.

[14] The RFA defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(4) (2012).

[15] The RFA defines "small governmental jurisdiction" as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(5) (2012).

enforcement of criminal laws; (3) necessary for national security reasons; or (4) issued pursuant to any statute implementing an international trade agreement.

With respect to any significant regulatory action not eligible for a Presidential waiver under subsection (b), subsection (c) provides that the President may submit a request to Congress for a waiver of this measure. The President's submission to Congress must: (1) identify the significant regulatory action and the scope of the requested waiver; (2) set forth all reasons why such action is necessary to protect the public health, safety, or welfare; and (3) explain why such action is ineligible for a Presidential waiver under subsection (b). The Amendment requires Congress to give "expeditious consideration" and to take appropriate legislative action with respect to such submission.

Section 5(a) provides that any party adversely affected or aggrieved by a regulatory action taken in violation of this Act is entitled to judicial review. Additionally, any determination by the President or the Secretary of Labor is subject to judicial review. Section 5(b) provides that any court having jurisdiction to review a significant regulatory action for compliance with any other law has jurisdiction to consider claims under this measure.

Section 5(c) requires a court to order corrective action by the agency, including remanding the significant regulatory action to the agency and enjoining the application or enforcement of such action, unless the court finds by a preponderance of the evidence that application or enforcement is required to protect against an imminent and serious threat to national security.

Section 5(d) requires a court to award reasonable attorneys fees and costs to a "substantially prevailing" small business in connection with any civil action under this measure. A small business qualifies as "substantially prevailing" even if such entity failed to obtain a final judgment in its favor if the agency changes its position after the civil action is filed.

Unless another provision of law requires filing suit in less than one year, section 5(e) permits a party to seek and obtain judicial review within one year following the date of the challenged agency action or or within 90 days after an enforcement action or notice thereof.

Section 5(f) defines, for purposes of this section, a "small business" that is different from how the term is defined in the RFA (and, by reference, in the rest of H.R. 4078). As used in section 5 of the Amendment, "small business" means any business that employs no more than 500 employees or has a net worth of less than $7 million on the date that a civil action is filed under this Act.

CONCERNS WITH H.R. 4078

I. H.R. 4078 IS BASED ON THE FALSE PREMISE THAT REGULATIONS AND JOB CREATION ARE LINKED

There is no credible evidence establishing that regulations have any substantive impact on job creation. Nonetheless, proponents of deregulatory measures such as H.R. 4078 wrongly and without any proof insist that regulations impose burdensome compliance costs on businesses and thereby stifle job creation. For instance, House Judiciary Committee Chairman Lamar Smith (R-TX) asserts:

> The American people urgently need jobs that only economic growth can give. Standing in the way of growth and job creation is a wall of Federal regulation.
>
> * * *
>
> New regulatory burdens and uncertainty about the economy have helped to keep trillions of dollars of private sector capital on the sidelines. Companies cannot safely invest if they cannot tell whether tomorrow's regulations will make their investments unprofitable.[16]

The focus on a purported link between regulations and job creation is, in fact, a red herring. Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations, offers this explanation for why these arguments are fully embraced by conservatives as part of their deregulatory mantra:

> Republicans have a problem. People are increasingly concerned about unemployment, but Republicans have nothing to offer them. The G.O.P. opposes additional government spending for jobs programs and, in fact, favors big cuts in spending that would be likely to lead to further layoffs at all levels of government. . . .
>
> These constraints have led Republicans to embrace the idea that government regulation is the principal factor holding back employment. They assert that Barack Obama has unleashed a tidal wave of new regulations, which has created uncertainty among businesses and prevents them from investing and hiring.
>
> No hard evidence is offered for this claim; it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber.[17]

The Majority's own witness clearly debunked the myth that regulations stymie job creation during his testimony at a legislative hearing held last year on an anti-regulatory bill authored by Chairman Smith. Christopher DeMuth, with the conservative think tank American Enterprise Institute, stated in his prepared testimony that the "focus on jobs . . . can lead to confusion in regulatory debates" and that "the employment effects of regulation, while important, are indeterminate."[18] A recently released study supports Mr.

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[16] *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011) [hereinafter H.R. 3010 Hearing] (remarks of Rep. Lamar Smith (R-TX), Chair, H. Comm. on the Judiciary).

[17] Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs,* N.Y. TIMES ECONOMIX, Oct. 4, 2011, *available at* http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/.

[18] H.R. 3010 Hearing (prepared statement of Christopher DeMuth, American Enterprise Institute); *see also* Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Minimal,* WASH. POST, Nov. 13, 2011, *available at* http://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gIQALRF5IN_story.html?hpid=z1 ("In 2010, 0.3 percent of the people who lost their jobs in layoffs were let go because of 'government regulations/intervention.' By comparison, 25 percent were laid off because of a drop in business demand. . . . Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job creation.").

Demuth's statement, finding that the effects of regulation are uncertain.[19]

If anything, regulations can *promote* job growth and put Americans back to work. For instance, the BlueGreen Alliance, notes:

> Studies on the direct impact of regulations on job growth have found that most regulations result in modest job growth or have no effect, and economic growth has consistently surged forward in concert with these health and safety protections. The Clean Air Act is a shining example, given that the economy has grown 204% and private sector job creation has expanded 86% since its passage in 1970.[20]

Also in reference to the Clean Air Act, the White House Office of Management and Budget (OMB) observed that 40 years of success with this measure has "demonstrated that strong environmental protections and strong economic growth go hand in hand."[21] Similarly, the Natural Resources Defense Council, the United Auto Workers, and the National Wildlife Federation jointly issued a report finding that vehicle emissions standards and clean vehicle research, development and production are already responsible for 155,000 jobs at 504 facilities in 43 states and the District of Columbia.[22] According to the same report, 119,000 jobs have been created in this industry since 2009 alone.[23]

In February 2012, *The New York Times* noted in an editorial that a pending rule under the Clean Air Act requiring power plants to reduce mercury and other toxic emissions by 90 percent in the next five years, which was approved by the Obama Administration in December, would result in 45,000 temporary construction jobs over the next five years and possibly 8,000 permanent jobs because of the upgrades required by the new rule.[24] This job growth would be in addition to the rule's expected benefit of preventing 11,000 deaths from heart attacks and respiratory diseases like asthma.[25]

Additionally, a report by Northeast States for Coordinated Air Use Management (NESCAUM) demonstrates a direct correlation between environmental regulations and job growth in the Northeast. It found that by enacting stricter fuel economy standards and pursuing cleaner forms of energy, more jobs would be created.[26] Specifically, NESCAUM found that stricter fuel economy standards

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[19] *See* Regulation, Jobs, and Economic Growth: An Empirical Analysis, The George Washington University Regulatory Studies Center Working Paper, at 27 (Mar. 2012) (finding that the "macroeconomic effects of regulation are uncertain" and that the study's "results reveal no impact" when considering either the impact of regulations on the "total economy or strictly the private sector"), *available at* http://regulatorystudies.gwu.edu/images/pdf/032212__sinclair__vesey__reg__jobs__growth.pdf

[20] Letter to Rep. Lamar Smith (R-TX), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Committee on the Judiciary, from David A. Forster, Executive Director, BlueGreen Alliance, at 2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[21] Executive Office of the President—Office of Management and Budget, Statement of Administration Policy on H.R. 2401, Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011 (Sept. 21, 2011).

[22] Natural Resources Defense Council et al., Supplying Ingenuity: U.S. Suppliers of Clean, Fuel-Efficient Vehicle Technologies (2011), *available at* http://www.nrdc.org/transportation/autosuppliers/files/SupplierMappingReport.pdf

[23] *Id.*

[24] Editorial, *The Job-Creating Mercury Rule,* N.Y. TIMES, Feb. 22, 2012, *available at* http://www.nytimes.com/2012/02/23/opinion/the-job-creating-mercury-rule.html.

[25] *Id.*

[26] Northeast States for Coordinated Air Use Management (NESCAUM), Economic Analysis of a Program to Promote Clean Transportation Fuels in the Northeast/Mid-Atlantic Region (2011) (on file with Natural Resources Defense Council) *available at* http://switchboard.nrdc.org/blogs/ngreene/CFS%20Economic%20Analysis%20Report%20INTERNAL.PDF

and regulations governing cleaner forms of energy would increase employment from 9,490 to 50,700 jobs; increase gross regional product, a measure of the states' economic output, by $2.1 billion to $4.9 billion; and increase household disposable income increases by $1 billion to $3.3 billion.[27]

H.R. 4078's proponents rely on an equally flawed corollary argument that regulatory uncertainty creates a disincentive for businesses to add jobs. Once again, Bruce Bartlett, the senior economic official from the Reagan and Bush Administrations, observed that:

> [R]egulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out. In other words, it is a simple case of political opportunism, not a serious effort to deal with high unemployment.[28]

Likewise, Minority witness Professor Sidney Shapiro testified last year, "All of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment."[29] This may explain the findings of a July 2011 *Wall Street Journal* survey of business economists, which found that the "main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies."[30] Not surprisingly, a September 2011 National Federation of Independent Business survey of its members found that "poor sales"—not regulation—is the biggest problem.[31] Indeed, the Main Street Alliance, a small business organization, observes:

> In survey after survey and interview after interview, Main Street small business owners confirm that what we really need is more customers—more demand—not deregulation. Policies that restore our customer base are what we need now, not policies that shift more risk and more costs onto us from big corporate actors.
>
> * * *
>
> To create jobs and get our country on a path to a strong economic future, what small businesses need is customers—Americans with spending money in their pockets—not watered down standards that give big corporations free reign to cut corners, use their market power at

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[27] *Id.*

[28] Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs,* N.Y. TIMES Economix Blog, Oct. 4, 2011, *available at* http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/?scp=4&sq=bartlett&st=cse.

[29] H.R. 3010 Hearing (prepared statement of Prof. Sidney Shapiro, Wake Forest School of Law).

[30] Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring,* WALL ST. J., July 18, 2011, *available at* http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html.

[31] Press Release, Nat'l Federation of Independent Businesses, Small Business Confidence Takes Huge Hit: Optimism Index Now in Decline for Six Months Running (Sept. 13, 2011) ("Of those reporting negative sales trends, 45 percent blamed faltering sales, 5 percent higher labor costs, 15 percent higher materials costs, 3 percent insurance costs, 8 percent lower selling prices and 10 percent higher taxes and regulatory costs."), *available at* http://www.nfib.com/press-media/press-media-item?cmsid=58190.

> our expense, and force small businesses to lay people off and close up shop.[32]

In sum, there is no credible evidence that regulations depress job creation.

II. H.R. 4078'S REGULATORY MORATORIUM JEOPARDIZES PUBLIC HEALTH AND SAFETY

A. The Bill Takes a Thoughtlessly Blunt Approach To Rulemaking

In imposing a moratorium, H.R. 4078 does not distinguish between genuinely burdensome or duplicative regulations and those that ensure that the air we breathe, the automobiles we drive, the food we eat, or the planes on which we travel are safe. It is essentially a "one-size-fits-all" measure that jeopardizes the public health and safety of Americans as a result.

Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs, addressed the ramifications of a regulatory moratorium during a hearing before the House Committee on Oversight and Government Reform last year. He warned:

> [A] moratorium would sweep up deregulatory measures which we are pretty enthusiastic about expediting, because they are regulatory actions. And . . . , and this is an important point, a moratorium would not be a scalpel or a machete. It would be more like a nuclear bomb in the sense that it would prevent regulations that, let's say, cost very little and have very significant economic or public health benefits. So a moratorium would have the disadvantage of defying what every President since President Reagan has endorsed, which is cost-benefit analysis.[33]

B. H.R. 4078's Exceptions Are Woefully Deficient

Furthermore, the bill's limited exceptions to its moratorium fail to address our concerns. While section 4(b) of the bill permits the President to determine by Executive Order whether a regulation should be exempted from the moratorium, such exemptions are extremely narrow and would apply only if the regulation is: (1) necessary because of an *imminent* threat to health or safety or other emergency; (2) necessary for the enforcement of criminal laws; (3) necessary for national security reasons; or (4) issued pursuant to any statute implementing an international trade agreement. With respect to the requirement that threats to health or safety or other emergency be "imminent" before a regulation could qualify for the exception, the president of Public Citizen observed,

> Imminent threat means immediate, right now, something that has to be done to prevent something that is otherwise going to happen in a very near term with a high degree of certainty. That is just why most regulation takes place. Take the example of food safety, we issue food safety rules usually because there has just been an outbreak of some

[32] Letter to Rep. Lamar Smith (R-TX), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Committee on the Judiciary, from Jim Houser, Co-Chair, The Main Street Alliance, *et al.,* at 1–2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[33] *How a Broken Process Leads To Flawed Regulations: Hearing Before the H. Comm. on Oversight and Government Reform,* 112th Cong. 181 (2011) (testimony of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

> problem, but not because we think it is about to happen again.
>
> You can go down the case of crib safety or auto safety or environmental protection or preventing another financial crisis, on and on, you go down the list it will almost never meet the standard of an imminent threat to health or safety or other emergencies. I believe the proper interpretation of this bill is that [there] will be a roughly 5-year moratorium on all health, safety, environmental, financial, et cetera, protections.[34]

To illustrate the shortcomings of these exceptions, Democratic Committee Members offered a series of amendments specifically excepting various types of regulations. For example, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that would have exempted any rule or guidance intended to protect the privacy of Americans.[35] This amendment, however, failed by a vote of 12 to 17. Likewise, Representative Jerrold Nadler (D-NY) offered an amendment that would have exempted nuclear reactor safety standards from the bill's definition of "significant regulatory action." That amendment failed by a vote of 13 to 17.[36] Representative Sheila Jackson Lee (D-TX) offered an amendment that would have excepted a rule or guidance issued by the Secretary of Homeland Security from the bill. That amendment failed by a vote of 12 to 15.

C. H.R. 4078's Congressional Waiver Is Effectively Illusory

Representative Griffin, the author of this legislation, offered an Amendment in the Nature of a Substitute at the Committee's markup that ostensibly sought to expand the bill's exception provisions.[37] The Amendment authorizes the President, with respect to any significant regulatory action not eligible for a Presidential waiver, to submit a request to Congress to waive the moratorium. The President's submission to Congress must: (1) identify the significant regulatory action and the scope of the requested waiver; (2) set forth all reasons why such action is necessary to protect the public health, safety, or welfare; and (3) explain why such action is ineligible for a Presidential waiver under subsection (b). The Amendment requires Congress to give expeditious consideration and to take appropriate legislative action with respect to such submission, which as we all know, is not likely to occur.

The benefits of this Amendment, however, are largely pyrrhic and effectively illusory. It provides no meaningful standards governing when Congress can or should grant a waiver and fails to provide for any expedited procedures for consideration of a Congressional waiver. Thus, left to languish in the regular legislative process, no Congressional waiver would ever realistically be granted in a timely manner.

There are innumerable instances where noncontroversial bills were passed by one house of Congress only to die in the other

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[34] *Regulatory Freeze for Jobs Act of 2012: Hearing on H.R. 4078 Before the Subcomm. on Courts, Commercial Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. 51 (2012) (testimony of Robert Weissman, President, Public Citizen).

[35] *Unofficial Tr. of Markup of H.R. 4078, the Regulatory Freeze for Jobs Act of 2012, by the Comm. on the Judiciary,* 112th Cong. 30 (2012) [hereinafter Markup].

[36] *Id.* at 70.

[37] *Id.* at 27.

house because of unrelated or political concerns. One need only consider the legislative history of the so-called "comma bill," which was passed by the House over the course of three Congresses before it became law.[38] This measure, which made a purely technical correction to title 9 of the United States Code, was first introduced during the 105th Congress.[39] The House passed it in 1997, but the Senate—on the last day of the Congress—passed the bill with a controversial and unrelated amendment. The following Congress, the bill was reintroduced in the House, but it was passed with a controversial amendment and, therefore, died in the Senate.[40] Thereafter, the bill was again reintroduced in the 107th Congress in 2001.[41] Representative James F. Sensenbrenner, Jr. (R-WI), then-Chairman of the House Judiciary Committee, made the following plea:

> Some may try to diminish the importance of this bill, but one should never underestimate the importance of a comma.
>
> To paraphrase the late Everett Dirksen, a comma here, a comma there, and pretty soon you have got a full sentence.
>
> Let us be honest with ourselves, when used properly, a comma can be devastatingly effective. For those, especially school children, who think that grammar and punctuation do not matter and tune themselves out during English class, today's action shows clearly that it does.
>
> Thankfully, not every grammar mistake, not every misplaced comma takes an act of Congress to correct, but this particular section of the United States Code does.
>
> This bill has been passed by each of the past two Congresses, only to be held hostage by unrelated issues in the other body.
>
> To my colleagues here and on the other side of the Capitol who have previously loaded up this bill with unrelated legislation, I say free the comma, and I urge my colleagues to pass H.R. 861.[42]

The legislation was finally enacted in 2002, five years after introduction.[43] Likewise, any congressional waiver under H.R. 4078 would be subject to the same political stalling and procedural hurdles.

III. H.R. 4078 IGNORES THE BENEFITS OF REGULATIONS

H.R. 4078 would impose a moratorium on a significant regulatory action, which it defines, in pertinent part, as a rule or guidance that may have an annual cost to the economy of $100 million or more." In addition to falsely claiming that regulations "kill" jobs, supporters of anti-regulatory measures such as H.R. 4078 contend that regulations impose burdensome costs on businesses. For exam-

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[38] *See, e.g.,* Nancy Benac, Congressional Conundrum Leaves "Comma Bill" in Coma, Associated Press, Apr. 17, 2002, *available at* http://news.google.com/newspapers?nid=1696&dat=20020417&id=Ev4aAAAAIBAJ&sjid=IEgEAAAAIBAJ&pg=6921,1940594

[39] H.R. 2440, 105th Cong. (1997).

[40] H.R. 916, 106th Cong. (1999).

[41] H.R. 861, 107th Cong. (2001).

[42] 147 Cong. Rec. H901 (daily ed. Mar. 14, 2001).

[43] Pub. L. 107–169 (2002).

ple, in nearly every hearing before the House Judiciary Committe regarding regulatory issues this Congress,[44] Majority witnesses have cited the same widely discredited study by economists Mark and Nicole Crain (Crain Study), which claims that Federal regulation imposes an annual cost of $1.75 trillion on business.[45]

The Crain Study has been thoroughly and repeatedly criticized for exaggerating regulatory costs. For example, the Center for Progressive Reform (CPR) notes that the $1.75 trillion cumulative burden cited by the study fails to account for any benefits of regulation.[46] In addition, the study's methodology is seriously flawed with respect to how it calculated economic costs. The study, which relied on international public opinion polling by the World Bank on how friendly a particular country was to business interests, ignored actual data on costs imposed by Federal regulation in the United States.[47]

CRS also conducted an extensive examination of the Crain Study and found much of its methodology to be flawed.[48] Moreover, CRS noted that the authors of the Crain Study themselves acknowledged that their analysis was "'not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to use in choosing the 'right' level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)'"[49] CRS concluded that "a valid, reasoned policy decision can only be made after considering information on both costs and benefits" of regulation.[50] The Economic Policy Institute reached a similar conclusion.[51]

OMB annually estimates the costs and benefits of regulations. Its Draft 2012 Report to Congress on Benefits and Costs of Federal Regulations finds that the net benefits of regulations through the third fiscal year of the Obama Administration exceed $91 billion, which is 25 times more than the net benefits during the first three

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[44] *See, e.g.,* Hearing on H.R. 3010; *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *The APA at 65—Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011).

[45] Nicole V. Crain & W. Mark Crain, The Impact of Regulatory Costs on Small Firms, Rep. No. SBAHQ-08-M-0466 (Sept. 2010), available at http://archive.sba.gov/advo/research/rs371tot.pdf.

[46] Sidney Shapiro *et al.,* Setting the Record Straight: The Crain and Crain Report on Regulatory Costs, Center for Progressive Reform White Paper #1103 (Feb. 2011).

[47] *Id.*

[48] Curtis W. Copeland, Analysis of an Estimate of the Total Costs of Federal Regulations, Congressional Research Service Report for Congress, R41763 (Apr. 6, 2011).

[49] *Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to te author of the CRS report).

[50] *Id.* The Economic Policy Institute also issued a critique of the Crain study outlining additional concerns with the study's methodology and data. *See* John Irons & Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited $1.75 Trillion Cost of Regulations Is Not Worth Repeating, Economic Policy Institute, July 19, 2011, *available at* http://w3.epi-data.org/temp2011/IssueBrief308.pdf.

[51] John Irons & Andrew Green, Flaws Call for Rejecting Crain and Crain Model: Cited $1.75 Trillion Cost of Regulations Is Not Worth Repeating, Economic Policy Institute, July 19, 2011, *available at* http://w3.epi-data.org/temp2011/IssueBrief308.pdf.

years of the George W. Bush Administration.[52] Similarly, the 2011 report concluded that for fiscal year 2010, Federal regulations cost between $6.5 billion and $12.5 billion, but generated between $18.8 billion and $86.1 billion in benefits.[53] According to OMB, the costs of regulations during the ten-year period from FY 1999 through FY 2009 were between $43 billion and $55 billion, while their benefits ranged from $128 billion to $616 billion.[54] Therefore, even if one uses OMB's highest estimate of costs and its lowest estimate of benefits, the regulations issued over the past ten years have produced net benefits of $73 billion to our society. Such estimates were consistent across Democratic and Republican administrations.[55] Given that the benefits of regulations consistently exceed the costs, the need for any legislation that would make the issuance of regulations more difficult or time consuming is certainly in question.

The benefits of regulation are also apparent when viewed through the lens of prevention. For example, a 2011 Environmental Protection Agency report found that the public health benefits of clean air regulations far outweigh the compliance cost to industry.[56] The report concluded that restrictions on fine particle and ground-level ozone pollution mandated by the 1990 Clean Air Act amendments would prevent 230,000 deaths and produce benefits of about $2 trillion by 2020.[57]

IV. H.R. 4078 FAILS TO ACCOUNT FOR THE ALREADY-EXTENSIVE RULEMAKING PROCESS

As we have discussed over the course of a series of anti-regulatory hearings during the past year,[58] regulations are not promulgated in a vacuum. The Constitution provides that the government may not deprive anyone of life, liberty, or property without "due

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[52] Office of Management and Budget, Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 21, *available at* http://www.whitehouse.gov/sites/default/files/omb/oira/draft__2012__cost__benefit__report.pdf.

[53] Office of Management and Budget, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 21, *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011__cb/2011__cba__report.pdf

[54] *See REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of Sally Katzen, former OIRA Administrator).

[55] *Id.*

[56] Environmental Protection Agency, Benefits and Costs of the Clean Air Act, Second Prospective Study—1990 to 2020 (2011) *available at* http://www.epa.gov/air/sect812/prospective2.html

[57] *Id. See also* Editorial, *The Job-Creating Mercury Rule,* N.Y. TIMES, Feb. 22, 2012, *available at* http://www.nytimes.com/2012/02/23/opinion/the-job-creating-mercury-rule.html (noting that an estimated 11,000 deaths will be prevented by pending mercury rule under the Clean Air Act).

[58] *See, e.g.,* H.R. 3010 Hearing; *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011) [hereinafter Formal Rulemaking Hearing]; *Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Costs and Benefits: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *Raising the Agencies' Grades—Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *The Regulations From the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *The APA at Six—Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011); *Regulatory Flexibility Improvements Act of 2011"—Unleashing Small Businesses to Create Jobs: Hearing on H.R. 527 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011 *The REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 112th Cong. (2011).

process of law."[59] This constitutional mandate of fair procedure applies to the Federal regulatory rulemaking and adjudicatory processes, the impact of which can be extensive.

The APA, enacted in 1946, establishes the minimum rulemaking[60] and formal adjudication requirements for all Federal agencies. The APA also sets forth standards for judicial review of final agency actions. While the APA sets minimum standards, many agency actions may involve procedures that depart from or go beyond APA requirements. As one academic noted, "[T]he American administrative system, by evolution and design, is characterized by a considerable degree of informality, agency discretion and procedural flexibility."[61] The APA's baseline procedural requirements are designed to maintain a balance between this type of agency flexibility and the requirements of due process. As more than 50 leading administrative law academics observed, "The APA has served for 65 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life."[62]

Agencies follow the informal notice-and-comment process for promulgating rules as outlined in section 553 of the APA in most instances. Notice-and-comment rulemaking, while flexible, is also subject to many procedural and analytical requirements, including those imposed by statutes other than the APA.[63] In fact, the current process may already be too"ossified." As Harvard Law School Professor Matthew C. Stephenson testified last year:

> It turns out, however, that the term 'informal rulemaking' is misleading. Nominally 'informal' notice-and-comment rulemaking is in fact heavily proceduralized, to the point where many commentators describe this process as a kind of "paper hearing." Agencies must provide a fairly detailed and specific proposal, or set of alternatives, in their initial published notice of proposed rulemaking. This notice must also disclose the scientific or evidentiary basis of the proposal, so that the agency's evidence can be subjected to critical scrutiny. Any interested party (indeed, any member of the public) may submit written comments on the agency's proposal. These submissions may criticize the agency's analysis and evidence, and may also suggest alternatives. Under Executive Order 12866, executive branch agencies must also submit proposed rules, along with a detailed cost-benefit analysis, to the Office of Management and Budget for review. If the agency decides to

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[59] U.S. Const. amend. XIV, § 1.

[60] The APA defines "rulemaking" as the "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(5) (2012). A "rule," in turn, is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2012).

[61] Gary J. Edles, *Lessons from the Administrative Conference of the United States,* 2 EUR. PUB. L. 571, 572 (1996).

[62] Letter from 52 administrative law academics to House Judiciary Committee Chair Lamar Smith and House Judiciary Committee Ranking Member John Conyers, Jr., at 1 (Oct. 24, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[63] *See, e.g.,* Regulatory Flexibility Act, 5 U.S.C. §§ 603, 604 (2012) (requiring assessments of regulatory impact of proposed and final rules on small entities); Unfunded Mandates Reform Act, 2 U.S.C. §§ 1531–1538 (2012) (requiring assessments of regulatory impact on state and local government entities of proposed and final rules).

> promulgate a final rule, it must provide a detailed written explanation that includes responses to all material comments submitted by interested parties. If an agency fails to respond adequately to criticisms or proposed alternatives submitted by commenters, the agency risks judicial reversal. This creates powerful incentives for agencies to take comments seriously and to provide detailed responses. Furthermore, if the agency decides to change its policy substantially in response to comments, it may have to initiate a new round of notice-and-comment so that all parties have a fair opportunity to critique the new proposal. . . . Indeed, the more common criticism of notice-and-comment rulemaking is that it is *too demanding* of agencies. . . .[64]

Additionally, agencies may choose or may be required by statute to use other rulemaking procedures, including formal rulemaking, negotiated rulemaking, and hybrid or expedited approaches, which generally tend to have greater procedural requirements and be subject to stricter judicial review than section 553 notice-and-comment rulemaking.

Admittedly, the regulatory process in the United States is not beyond perfection. President John F. Kennedy, in 1961, observed that "the steady expansion of the Federal administrative process during the past several years has been attended by increasing concern over the efficiency and adequacy of department and agency procedures."[65] With Federal agencies issuing "more than 4,000 final rules each year on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water,"[66] the current Federal regulatory process faces some significant challenges.

Nonetheless, opponents of regulation have made unsupported assertions that the rulemaking process failed properly to account for compliance costs and industry input, which were the subject of a series of hearings before the Subcommittee and full Committee last year. Testimony and other evidence presented by Minority witnesses at these hearings, however, clearly demonstrated that these assertions were completely unfounded.

V. H.R. 4078 IS UNWORKABLE AND WILL CREATE MORE, NOT LESS, UNCERTAINTY

A. H.R. 4078 Is Inherently Unworkable

Besides being based on false premises, H.R. 4078 also would impose an unworkable process on agencies. Section 3 of the bill specifically provides that the moratorium applies for "any quarter" where the Bureau of Labor Statistics average of monthly unemployment rates is equal to or less than six percent. In light of the fact that unemployment rates can fluctuate from quarter to quarter, this means that agencies would have to stop and restart the

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[64] Formal Rulemaking Hearing (statement of Matthew C. Stephenson, Harvard Law School) (citations omitted); *see also* H.R. 3010 Hearing (statement of Sidney Shapiro, Wake Forest Law School) ("The regulatory system is already too ossified, and H.R. 3010 would only exacerbate this problem.").

[65] Exec. Order No. 10,934, 26 Fed. Reg. 3233 (Apr. 13, 1961).

[66] Curtis W. Copeland, Electronic Rulemaking in the Federal Government, Congressional Research Service Report for Congress, RL34210, at 2 (May 16, 2008).

promulgation of a rulemaking depending on the average unemployment rate, including the period for public notice and comment. For example, the average unemployment rate in 2003 was below six percent for the first quarter, but then exceeded that threshold in the second and third quarters.[67] It then was below six percent in the last quarter of 2003.[68] Moreover, the bill is silent as to whether the agency would have to re-notice or simply suspend the comment period. Either way, the moratorium as conceived in H.R. 4078 would be totally unpredictable and unnecessarily disruptive to the enforcement of Federal policy.

B. H.R. 4078 Promotes More, Not Less Uncertainty

Given the intermittent nature of the bill's regulatory moratorium, as explained in the preceding section, the clear import of H.R. 4078 will be to create uncertainty. Businesses would have no ability to predict when a rule would ever be finalized, especially given the impact of events that could occur, but over which the Federal Government has no control, e.g., a worldwide fuel shortage, an international virus outbreak, or other far-ranging crisis. In addition, the period during which a person may seek judicial review of a challenged agency action under the bill can be in excess of one year,[69] which put businesses in the unfortunate position of having to expend funds to comply with a rule that is later successfully set aside under this bill.

To illustrate the bill's deleterious effects, Representative Mel Watt (D-NC), during the Committee markup of H.R. 4078, discussed how H.R. 4078 would affect regulations required to be promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank).[70] He explained:

> My concern with this bill is that it adds to the level of uncertainty because what most of my constituents are saying is we need to get on with adopting and finalizing the regulations under Dodd-Frank so that we know what the rules of the road are going forward.
>
> And it is that uncertainty that is causing us not to be able to plan and not to be able to adapt our business plans to what is necessary going forward so that we don't have another economic, financial services meltdown like we had in the past. We know that we need to make adjustments, but we need to have the final regulations in place to be able to do that.
>
> The problem I have with this bill is that it does not add to the level of certainty that businesses have because, apparently, whatever those regulations are in process under Dodd-Frank will be put on hold now, waiting for the unemployment rate to drop below 6 percent. If it drops below 6 percent for a little while, maybe they can gear up again and start writing the regulations again and publishing them.

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[67] U.S. Dep't of Labor, Bureau of Labor Statistics—Labor Force Statistics from the Current Population Survey (data extracted Feb. 21, 2012; 4:15 pm), *available at* http://data.bls.gov/timeseries/LNS14000000.

[68] *Id.*

[69] Section 5(f) provides that the judicial review period is one year from the date of the challenged agency action or 90 days after an enforcement action.

[70] Pub. L. No. 111–203 (2010).

> But if it happens to go back over 6 percent during that period . . . then they have to suspend again, apparently, under this bill. So we may get to a degree of certainty. . . .[71]

Representative Sheila Jackson Lee (D-TX) thereafter offered an amendment that would have excluded any rule or guidance issued pursuant to the Dodd-Frank Act. This amendment, however, failed by a vote of 11 to 14.

C. H.R. 4078 Does Not Specify Who Will Make the Determination That a Regulatory Action is "Significant"

While section 2 of H.R. 4078 defines "significant regulatory action," the bill fails to identify who would determine whether a rule or guidance is covered by such definition and how such determination would be made. Ostensibly, the bill appears to lift this definition largely from Executive Order 12866, but it does so in a vacuum. For example, the Executive Order specifies a protocol requiring agencies to submit to OIRA a "list of its planned regulatory actions, including those *which the agency believes are significant regulatory actions within the meaning of this Executive order.*"[72] Under the Executive Order, OIRA is given supervisory authority over agencies to ensure their compliance. In contrast, H.R. 4078 is silent as to who would make this determination and whether such determination is subject to challenge.

D. H.R. 4078's Definition of Significant Regulatory Action Is Vague

As noted above, H.R. 4078's definition of "significant regulatory action" is largely derived from Executive Order 12866. By taking the language of the Executive Order out of context, however, H.R. 4078 fails to clarify how this definition should be interpreted and applied. For example, when would a proposed rule "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, small entities, or State, local, or tribal governments or communities"? What degree of materiality is contemplated by this provision?

E. H.R. 4078 Mandates Unreasonable Standards for the Award of Fees and Costs

Section 5(e) of the bill requires a court to award reasonable attorneys fees and costs to a "substantially prevailing" business in any civil action arising under this legislation. This provision is problematic for two reasons. First, it conflicts with most Federal fee-shifting provisions that give the courts discretion with regard to such awards. Of those statutes that mandate the award of fees and costs, usually there is a requirement that the court find the action of the litigant was in bad faith, frivolous, or otherwise lacking in merit. H.R. 4078, however, imposes a strict liability mandate, even if the agency acted in good faith. Second, the bill requires such awards be made even if the small business fails to obtain a final judgment where the agency changes its position after the civil action is filed. The measure, however, fails to require any causal link

[71] Markup at 39–40.
[72] Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51741 (Oct. 4, 1993) (emphasis supplied).

between the agency's action and the small business's lawsuit. Agencies may change their position for any number of reasons, none of which may have any connection to a pending civil action, such as newly discovered evidence, changed circumstances, or reordered priorities pursuant to a new Administration's assumption of power. This provision would result in unjust enrichment for private parties at the expense of the American taxpayer.

F. Not Even the Congressional Budget Office Can Determine the Budgetary Impacts of H.R. 4078

CBO, in its analysis of the budgetary impact of H.R. 4078, discussed a series of problematic aspects presented by the measure. While the bill "could have a significant impact on spending subject to appropriation," it could not determine the "magnitude of that effect." [73] Part of the difficulty in analyzing the impact of H.R. 4078, CBO observed, is the fact that it would delay significant regulatory actions until the average of monthly unemployment rates for any quarter is six percent or lower. As CBO explained:

> Under CBO's most recent economic forecast, the unemployment rate is expected to remain elevated for at least the next few years; in those projections the unemployment rate would remain above 6.0 percent until late 2016. However, many developments could cause economic outcomes to differ substantially, in one direction or the other. For example, the economy could grow more rapidly—or more slowly—with a consequent acceleration (or reduction) in the pace of employment. Furthermore, changes in fiscal policy that diverge from the path assumed in CBO's baseline could have a significant impact on economic growth and, by extension, the unemployment rate.[74]

With respect to direct spending, CBO cited examples of how the legislation could adversely impact Medicare service providers and American taxpayers. CBO explained that the bill, if enacted, would freeze annual updates to payment schedules applicable to hospitals, physicians, and other Medicare service providers. On the other hand, H.R. 4078 would also prevent payment rate reductions scheduled to take place under the Medicare physician fee schedule.[75]

In addition, the CBO observed that the bill may affect the implementation of new laws, including the Affordable Care Act, and other initiatives. As to the latter, CBO cited title VI of the Middle Class Tax Relief and Job Creation Act of 2012, which authorizes the Federal Communications Commission to develop proposed rules for incentive auctions. By delaying these initiatives, H.R. 4078 could reduce expected auction receipts "by several billion dollars over the 2013–2022 period, relative to current law." [76]

Finally, the CBO noted that the legislation, by "delaying significant regulatory actions of the Internal Revenue Service," could reduce collections of revenues in some cases and increase the collec-

[73] CBO Cost Estimate at 1.
[74] *Id.* at 3.
[75] *Id.*
[76] *Id.* at 4.

tions in other cases.[77] The bill "would also directly affect revenues through the operations of the Federal Reserve" by limiting its ability "to conduct monetary policy because some parameters, such as the discount rate and the interest paid on reserves, are specified in regulations."[78]

VI. H.R. 4078 May Undermine Job Creation By Increasing the Risk of Regulatory Failure

During recessionary times, unemployment rates increase. Major financial distress in American history has often been triggered by a regulatory failure of some type. The Great Depression largely resulted from the failure of severely uncapitalized banks that engaged in imprudent lending practices and other speculative activities. The current Great Recession was largely fueled by an unregulated home mortgage industry and securitization market.

Rather than promoting employment, however, H.R. 4078 would foster more unemployment by tying the hands of the government from instituting regulatory reforms that are most needed to address the causes of the major financial distress. For example, it is very likely that H.R. 4078, if it was enacted, would prevent regulators, such as the Securities and Exchange Commission, from instituting corrective regulations intended to prevent another Great Recession.

VII. Judicial Review of Executive Orders May Present Separation of Powers Concerns

Section 4(a) of the bill authorizes an agency to take a significant regulatory action if the President makes a determination that such action qualifies under one of the enumerated waivers set forth in section 4(b). Section 5(b) of the bill, in turn, specifies that "[a]ny person who is adversely affected or aggrieved" by any such determination by the President is subject to judicial review under the APA. In effect, this provision would permit a private individual to apply to a court, which could then second-guess the President's determination that a waiver was necessary to address national security or public health concerns under the various standards set forth in the APA. Under these standards, a court may set aside actions found to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

[77] *Id.*
[78] *Id.*

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[79]

In making this determination, the court must review the entire record.[80]

The Supreme Court has held that the "President is not an agency within the meaning of the [Administrative Procedure] Act."[81] To make the President subject to the APA, the Court stated that it "would require an express statement by Congress before assuming it intended the performance of the President's statutory duties to be reviewed for abuse of discretion."[82] It is unclear, however, whether the requirements of H.R. 4078 presents an unwarranted intrusion into the President's constitutional authority to "take Care that the Laws be faithfully executed."[83]

CONCLUSION

We oppose H.R. 4078 because it is based on the false premise that regulations stifle job creation and cause business uncertainty. By placing a moratorium on significant regulatory actions and by including insufficient exceptions and an illusory congressional waiver provision, H.R. 4078 ignores the benefits of regulation and threatens public health and safety. H.R. 4078 is also unworkable because it relies on an indeterminate standard for establishing when a regulatory moratorium should begin and end and is full of other ambiguities. These ambiguities will only lead to greater uncertainty and societal harm through regulatory failure. Finally, H.R. 4078 may raise separation of powers concerns because of its interference with the judicial role in reviewing regulatory action. For these reasons, we respectfully dissent and urge our colleagues to oppose this bill.

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[79] 5 U.S.C. § 706 (2012).
[80] *Id.*
[81] Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).
[82] *Id.* at 801.
[83] U.S. Const. art. II, sec. 3.